

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Winstar Communications, LLC)
Emergency Petition for Declaratory)
Ruling Regarding ILEC Obligations)
to Continue Providing Services)

WC Docket No. 02-80

REPLY COMMENTS OF M/C VENTURE PARTNERS

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M/C Venture Partners submits these Reply Comments in support of the Emergency Petition for Declaratory Ruling of Winstar Communications, LLC (the “Emergency Petition”) and in opposition to the Counter-Petition of Verizon for Declaratory Ruling (the “Counter-Petition”). For the reasons set forth below, the Commission should grant the Emergency Petition and should take the steps necessary to ensure that the customers of Winstar Wireless, Inc. (“Old Winstar”) are seamlessly migrated to Winstar Communications, LLC (“IDT Winstar”) without any interruption of service.

I. DESCRIPTION OF M/C VENTURE PARTNERS

M/C Venture Partners is a private equity venture fund that focuses exclusively on investing in early-stage communications and information technology companies. M/C Venture Partners has over two decades of experience investing in such companies. M/C Venture Partners seeks to identify well-positioned entrepreneurs and companies, and is typically the first institutional investor in the companies in which it invests.

M/C Venture Partners currently has investments in a range of communications and IT companies, including McLeodUSA, Cavalier Telephone, Novaxess, Florida Digital Networks, City Signal Communications, and Metro PCS, among others. Most relevant to the current proceeding, M/C Venture Partners has significant investments in a number of competitive local exchange carriers. The Commission's decision in this matter thus may affect the value of M/C Venture Partners' current investments as well as the attractiveness of future investments in the competitive telecommunications industry.

II. THE COMMISSION NEED NOT ADDRESS THE RBOCs' ARGUMENTS UNDER THE BANKRUPTCY CODE

In their comments in opposition to the Emergency Petition, Qwest Corporation, Verizon, and SBC Communications Inc. (the "RBOCs") argue that IDT Winstar is bound by Section 365 of the Bankruptcy Code. Therefore, they contend, IDT Winstar must either assume the pre-petition debts of Old Winstar (whereupon the ILECs will "assign" Old Winstar's facilities to IDT Winstar) or re-order the facilities required to provide service. The RBOCs also cite their tariffs for their position that IDT Winstar must pay the pre-petition debts of Old Winstar.

Those arguments, however, are irrelevant to the Commission's analysis. They are no more than an attempt by the RBOCs to deflect the Commission's attention from the real issue: the RBOCs' current obligations to IDT Winstar under the Communications Act of 1934, as amended (the "Act").¹ As discussed below, the RBOCs are clearly required under the Act to provision the services and facilities necessary for IDT Winstar to service Old Winstar's former

¹ The RBOCs' tariff argument, while styled as arising under the Act, presents the question whether the terms and conditions of tariffs supercede the Bankruptcy Code. M/C Venture Partners notes that several courts that have discussed this matter in the context of transfers of numbers have agreed that the terms of a carrier's tariff requiring payment of outstanding amounts as a condition to a transfer are subordinated to the Bankruptcy Code. See, e.g., *In re Personal Computer Network Inc. v. Illinois Bell Tel. Co.*, 85 B.R. 507 (Bankr. N.D. Ill. 1988); *In re Fontainebleu Hotel Corp.*, 508 F.2d 1056 (5th Cir. 1975); *In re Kassuba*, 396 F. Supp. 324 (N.D. Ill. 1975).

customers and to facilitate the transfer of those customers to IDT Winstar. The RBOCs' failure to do so is a violation of the Act. Whether IDT Winstar is required to pay Old Winstar's pre-petition debts is not at issue in this proceeding and does not need to be addressed by the Commission. The RBOCs' contentions that they are entitled to payment from IDT Winstar is an issue of bankruptcy policy that is best addressed by the Bankruptcy Court.

III. THE COMMUNICATIONS ACT OBLIGATES THE RBOCs TO PROVIDE FACILITIES AND SERVICES TO IDT WINSTAR

As the Emergency Petition makes clear (and the RBOCs' comments ignore), the Act requires the RBOCs to provision the facilities necessary for IDT Winstar to provide service to the customers that it purchased from Old Winstar. The RBOCs also must facilitate the migration of Old Winstar's customers to IDT Winstar. *See, e.g.*, 47 U.S.C. §§ 201, 202, and 251. The RBOCs' threats to disconnect Old Winstar's customers and their delays in provisioning the facilities requested by IDT Winstar violate their obligations to provide services on just and reasonable terms and conditions. *Id.* It is clearly within the jurisdiction of the Commission to order the RBOCs to comply with their obligations under the Act. Therefore, the Commission should grant the Emergency Petition, order the RBOCs promptly to provide the requested facilities to IDT Winstar, and enjoin the RBOCs from disconnecting Old Winstar's customers during the migration to IDT Winstar.

Tellingly, the RBOCs' comments do not deny that they are subject to common carrier obligations as regards IDT Winstar. Instead, they erroneously claim that Section 365 of the Bankruptcy Code and their tariffs require IDT Winstar to pay Old Winstar's pre-petition debts as a condition to providing the requested services. In so doing, the RBOCs hope to hold IDT Winstar hostage and force the company to assume Old Winstar's pre-petition debts. The RBOCs'

comments, however, fail to provide any legitimate reason why the provisions of Section 365 of the Bankruptcy Code should trump their common carrier obligations under the Communications Act. Moreover, they cannot make such an argument because the Bankruptcy Code and the Communications Act do not conflict. The common carrier provisions of the Act are intended to ensure that competitors can obtain the services and facilities that they need to provide services. The RBOCs have acknowledged that IDT Winstar, as a competitive local exchange carrier, can receive those services. Thus, there appears to be no question as to the RBOCs' common carrier obligations toward IDT Winstar.

The RBOCs' argument under the Bankruptcy Code is a backward-looking claim for payment for services provided to Old Winstar prior to its bankruptcy filing. Whether or not the RBOCs are entitled to payment for those services has no bearing on their obligations under the Communications Act as common carriers. While the RBOCs are free to take up the issue of payment in the proper forum – the Bankruptcy Court – their arguments under the Bankruptcy Code do not vitiate their current obligations under the Communications Act. As IDT Winstar pointed out in its Emergency Petition, the Commission has made clear that “carriers who are requested to provide service should make all efforts to do so, such as providing them under protest pending the resolution” of disputes.² That is exactly what the RBOCs must be required to do in this case: Comply with their obligations under the Act while they pursue their claims in the Bankruptcy Courts.

Besides their claims to payment for Old Winstar's pre-petition debts, the RBOCs offer no other reason why they can not provide services to IDT Winstar. M/C Venture Partners understands that the RBOCs are being paid by Old Winstar for the current use of the facilities

² See Emergency Petition, at 9, and cases cited therein.

and services and will be paid by IDT Winstar when the facilities are provisioned, so the RBOCs cannot claim to be financially harmed by being required to provide the services.³ Likewise, the provision of services going forward will not change the RBOCs' financial situation with regard to Old Winstar's pre-petition debt or prejudice their claim to payment.

The absence of any possible harm arising from the provision of the services requested by IDT Winstar shows that the RBOCs' claim that they cannot immediately migrate Old Winstar's customers to IDT Winstar without "temporary" customer disconnects is no more than an attempt by the RBOCs either to blackmail IDT Winstar into paying Old Winstar's pre-petition debts or to capture Old Winstar's clients for themselves. Obviously, the circuits required by IDT Winstar are the same ones used currently by Old Winstar. There is no "queue" or "waiting list" for access to those facilities. In fact, no physical action at all is required for the RBOCs to "provision" the requested facilities, since they are already in place. Rather, all that is needed is for the RBOCs to change the billing name and address for those services.

The RBOCs' refusal to take these minor actions is clearly unjust and unreasonable, and therefore unlawful, under the Act. Moreover, their actions will result in needless customer disconnects and inconvenience. The Commission should not permit the RBOCs to avoid their obligations under the Act or to inconvenience customers by resorting to such patently improper

³ In its comments, SBC alleges that Old Winstar and IDT Winstar also are delinquent in paying amounts owed to SBC for certain post-petition services. *In re Winstar Communications LLC Emergency Petition for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services*, WC Docket No. 02-80, Comments of SBC Communications Inc. (filed Apr. 29, 2002), at 3. Even if true, SBC's claim is a red herring. First, as SBC admits in footnote 5 of its comments, funds equal to the amount allegedly owed have been placed in escrow by IDT Winstar pending the resolution of its billing disputes with SBC. Second, M/C Venture Partners assumes that the Bankruptcy Court will address whether IDT Winstar is required to pay those funds to SBC. Thus, SBC's claim that it is not being paid for ongoing services is both misleading and irrelevant to SBC's obligations under the Act.

tactics.⁴ Rather, the Commission should compel the RBOCs to comply with their obligations under the Act by migrating Old Winstar's customers to IDT Winstar and by making available the facilities and services required for IDT Winstar to serve those customers without any customer disconnects.

IV. THE ABILITY TO TRANSFER CUSTOMERS IS CRITICAL TO THE FUTURE OF COMPETITION

The ongoing difficulties of the competitive telecommunications industry pose significant challenges to carriers, customers, and regulators. At the same time, the current market offers opportunities for financially sound carriers to acquire assets and customers relatively inexpensively from struggling providers. Ensuring that those carriers who remain can readily transfer the operations and customers is critical to the future of competition in the telecommunications sector. While the Commission has dealt with a relatively small number of such transfers to date, the large number of recent bankruptcies make it likely that other carriers will seek to transfer customers and other assets. The Commission should take the opportunity presented by the Emergency Petition to send a clear message that the Commission will support potential investors in their attempts to rescue struggling carriers.

Rather than facilitating transfers of customers and service, as they are required to do, the RBOCs actively seek to impede competitors' ability to migrate customers and delay transitions of services and facilities. The transparent motivation for such behavior is the RBOCs' hope that frustrated end users will instead switch to the RBOCs' services. Such actions obviously harm investors in companies like IDT Winstar and Cavalier Telephone (see discussion below), who

⁴ As stated by the General Services Administration in its comments, "uninterrupted availability of telecommunications is of utmost importance to [federal] agency operations." *In re Winstar Communications LLC Emergency Petition for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services*, WC Docket No. 02-80, Comments of General Services Administration (filed Apr. 29, 2002), at 3.

are effectively denied the benefit of their investments or are forced to incur substantial unexpected and unnecessary expense. More broadly, the RBOC-created difficulties in transferring customers make it less likely that potential buyers will be willing to take the risk of acquiring the assets and customers of struggling companies. Through these actions and others, the RBOCs hope to snuff out those competitors that they were not able to drive out of business. The end result will be a substantial increase in customer service disconnection, an reduction in competitive choices for consumers, and the evaporation of the substantial societal investment in the competitive telecommunications industry.

The Commission should not allow the RBOCs to harm the public interest and customer choice through their failure to comply with their statutory obligations. At the same time, the Commission should send a message to potential buyers of distressed companies that the Commission will facilitate transfers of customers and assets. While M/C Venture Partners does not believe that the Emergency Petition is the proper basis for a broad policy announcement, by granting the petition and requiring the RBOCs promptly to transfer Old Winstar's customers to IDT Winstar, the Commission will send the message that transfers like that contemplated by IDT Winstar are in the public interest and will be supported by the Commission.

In addition to the IDT Winstar example, the experience of one of the companies in which M/C Venture Partners invests, Cavalier Telephone ("Cavalier"), demonstrates why Commission action is needed. In January 2002, Cavalier purchased out of bankruptcy certain assets, including the customer base, of Net2000 Communications, Inc. ("Net2000"). Cavalier thereafter sought to transfer Net2000's customers to Cavalier. While Verizon was initially cooperative, it subsequently imposed a number of roadblocks to the transfer. As it did with IDT Winstar, Verizon insisted that Cavalier pay the pre-petition debts of Net2000 as a condition to transferring

Net2000's customers to Cavalier.⁵ Verizon also refused to provision new facilities to Cavalier for Net2000's customers, claiming that no facilities were available. (The facilities were, of course, being used to service the same Net2000 customers that Cavalier was trying to transfer!) Finally, Verizon required Cavalier to provide service to the Net2000 customer pursuant to the special access arrangements previously negotiated by Net2000, which substantially increased the cost to Cavalier of serving Net2000's former customers.

The actions of the RBOCs toward Cavalier, IDT Winstar, and likely other carriers, in addition to violating the RBOCs' obligations under the Act, threaten to reduce customer choice, increase service disruptions, and minimize the recovery of the competitive communications market by rendering it impossible to transfer customers unless buyers agree to assume the target's pre-petition debts. In many cases, this provides the RBOCs with a priority over other unsecured creditors and removes the financial incentive to enter into a purchase arrangement. Moreover, the RBOCs are motivated to increase delays in implementing any transfers so that affected end users will abandon competitive carriers for RBOCs themselves. While the response of end users is understandable, the effect of their decisions will be to reduce further the likelihood that distressed or bankrupt companies will find buyers for their assets.

The RBOCs' actions are calculated to have that exact effect, with the goal of further consolidating their hold over the telecommunications market. Therefore, the Commission should take this opportunity to speak in favor of continued competition in the telecommunications market by granting the Emergency Petition and by making clear to the RBOCs their obligation to facilitate the transfer of customers.

⁵ Verizon's claim was denied by the U.S. Bankruptcy Court for the District of Delaware. Verizon has appealed the Bankruptcy Court's order.

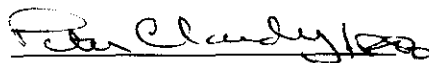
V. THE COMMISSION SHOULD DENY VERIZON'S COUNTER-PETITION

In its Counter-Petition, Verizon asks the Commission to rule (i) that the Communications Act does not exempt telecommunications carriers from Section 365 of the Bankruptcy Code; and (ii) that under its tariffs Verizon may collect from buyers amounts owed for services rendered by Verizon to sellers of assets and customers. As discussed above, IDT Winstar's requested relief does not depend on the Commission interpreting the provisions of the Bankruptcy Code or Verizon's tariffs. Rather, IDT Winstar's claim for relief is based on the RBOCs' obligations under the Communications Act. For the same reasons, Verizon's requested rulings are irrelevant to this proceeding. Therefore, the Counter-Petition should be denied.

VI. CONCLUSION

For the foregoing reasons, the Commission should grant the Emergency Petition of IDT Winstar and take the actions necessary to ensure that the RBOCs seamlessly migrate the customers of Old Winstar to IDT Winstar. Further, the Commission should deny the rulings requested by Verizon in its Counter-Petition.

Respectfully submitted,



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I hereby certify that on this 3rd day of May, 2002, I caused true and correct copies of the foregoing Reply Comments of M/C Venture Partners to be served upon the following persons by first-class mail (unless otherwise noted):

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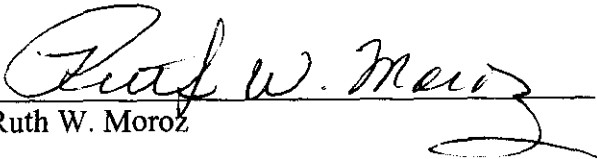
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